UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

ALONZO VOELKER	
vs.	C.A. No. 01-621-T
UNITED STATES OF AMERICA	

MEMORANDUM AND ORDER

Ernest C. Torres, Chief Judge

Alonzo Voelker has filed a Motion to Vacate, Set Aside or Correct his Sentence pursuant to 28 U.S.C. § 2255. For reasons stated below, that motion is denied.

Background

On May 9, 2000 Voelker pled guilty to one count of conspiracy to distribute cocaine base in violation of 21 U.S.C.
§ 846 and three counts of distribution of cocaine base in violation of 21 U.S.C. §841(a)(1).

Voelker's plea was entered pursuant to a plea agreement negotiated by his retained counsel, Carmine Giuliano. Since Attorney Giuliano is not a member of the bar of this Court, he was admitted *pro hac vice* in association with Attorney John M. Cicilline who is a member of the bar of this Court.

In the plea agreement, the Government promised to refrain from charging Voelker with a continuing criminal enterprise,

which would have enhanced his sentence. The Government further agreed to file a motion for a downward departure under Guideline § 5K 1.1 if, "in its sole discretion", the Government determined that Voelker had provided substantial assistance in the investigation or prosecution of other crimes.

The pre-sentence investigation report ("PSR") calculated Voelker's sentencing range under the United State Sentencing Guidelines (November 1, 1998 ed.)("USSG" or "Guidelines") as 188-235 months. In making that calculation, the probation officer

determined that Voelker was a "leader" of the conspiracy and increased Voelker's offense level by four levels, pursuant to USSG §3B1.1(a). Voelker's offense level was further increased by two levels, pursuant to § 3B1.4, on the ground that he had used a minor in committing the offense. Pursuant to § 4A1.1(c), the PSR also assessed one point, based upon a prior conviction of driving under the influence of alcohol, and a total of four points under §4A1.1(a) and § 4A1.1(c) for prior state court convictions for drug offenses. No objections to the PSR were filed within the period prescribed by the Local Rules of this District. See Dist. R.I. L.R. 40.2(a).

Due to a delay in filing (based on defense counsel's

mistaken belief that it had been filed earlier), Attorney Giuliano's motion for admission *pro hac vice* was not granted until the sentencing hearing held on August 15, 2000.

At the sentencing hearing Giuliano requested a continuance for the purpose of filing objections to the PSR. In considering that request, the Court required that counsel, first, describe the nature of the proposed objections and afforded Voelker and his counsel an opportunity to confer. After conferring, counsel, with Voelker's concurrence, decided not to proffer any objections and elected to proceed with sentencing.

During the sentencing hearing, the Government stated that information provided by Voelker up to that point did not merit a downward departure, but the Government held out the possibility that, if substantial assistance was provided in the future, it might seek a reduction in Voelker's sentence pursuant to Fed.R.Crim.P. 35.

Voelker received a sentence of 188 months imprisonment that was summarily affirmed on appeal. See United States v. Voelker, Dkt. No. 00-2161 (September 10, 2001).

The Government later decided not to seek reduction in Voelker's sentence, for reasons contained in a letter to Voelker's appellate counsel. See Government's Response to

Defendant's Motion to Vacate Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255 ("Gov't. Resp."), Exh. 6.

In his section 2255 petition Voelker claims that his plea was not voluntary and that his counsel was ineffective in failing to object to the manner in which the PSR calculated his guideline range, failing to enforce the Government's "agreement" to seek a downward departure for substantial assistance, and failing to contest the assessment of criminal history points with respect to convictions in Connecticut for various state crimes.

Discussion

Section 2255

The pertinent section of § 2255 provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence is in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255, ¶ 1 (2000).

Generally, the grounds justifying relief under 28 U.S.C. §2255 are limited. A court may grant such relief only if it finds a lack of jurisdiction, constitutional error or a fundamental error of law. United States v. Addonizio, 442

U.S. 178, 184-185, 99 S.Ct.2235 (1979). "[A]n error of law does not provide a basis for collateral attack unless the claimed error
constituted a fundamental defect which inherently results in a complete miscarriage of justice." Id. at 184-185 (internal quotations omitted).

A prisoner seeking relief under § 2255 is procedurally barred from raising issues not presented on direct appeal unless he demonstrates "'cause' and 'prejudice;'" or, alternatively, presents evidence that he is "'actually innocent.'" Brache v. United States, 165 F.3d 99, 102 (1st Cir 1999)(quoting Murray v. Carrier, 477 U.S. 478, 485, 496 (1986)). However, those showings are ordinarily not required with respect to ineffective assistance of counsel claims. Knight v. United States, 37 F.3d 769, 774 (1st Cir.1994).

A prisoner who invokes §2255 is not entitled to an evidentiary hearing as a matter of right. See United States v. McGill, 11 F.3d 223, 225 (1st Cir.1993). Where the files and records conclusively establish that a prisoner's claims are without merit, no hearing is required. See United States v. Carbone, 880 F.2d 1500, 1502 (1st Cir. 1989)("A hearing is not necessary where a §2255 motion (1) is inadequate on its face, or (2) although facially adequate, is conclusively refuted as to the alleged facts by the files and records of the case.")(internal quotations omitted).

The Ineffective Assistance Standard

A defendant who claims that he was deprived of his Sixth Amendment right to effective assistance of counsel must demonstrate:

1. That his counsel's performance "fell below an objective standard of reasonableness"; and

2. "[A] reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984). See also Cofske v. United States, 290 F.3d 437, 441 (1st Cir. 2002).

The defendant bears the burden of identifying the specific acts or omissions constituting the allegedly deficient performance. Conclusory allegations or factual assertions that are fanciful, unsupported or contradicted by the record will not suffice. Dure v. United States, 127 F.Supp.2d 276, 279 (D.R.I. 2001)(citing Lema v. United States, 987 F.2d 48, 51-52 (1st Cir. 1993)); see also Barrett v. United States, 965 F.2d 1184, 1186 (1st Cir. 1992)(summary dismissal of § 2255 motion is proper where, *inter alia*, grounds for relief are based on bald assertions).

In assessing the adequacy of counsel's performance:

> [T]he Court looks to "prevailing professional norms." A flawless performance is not required. All that is required is a level of performance

> that falls within generally accepted boundaries of competence and provides reasonable assistance under the circumstances.

Ramirez v. United States, 17 F. Supp. 2d 63, 66 (D.R.I. 1998) (quoting Scarpa v. Dubois, 38 F.3d 1, 8 (1st Cir. 1994) and citing Strickland, 466 U.S. at 688).

The standard applied in making that assessment is a highly deferential one. Thus,

> [The] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'

Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

Counsel's judgment need not be right so long as it is reasonable. United States v. McGill, 11 F.3d 223, 227 (1st Cir. 1993). Furthermore, reasonableness must be determined "[without] the distorting effects of hindsight." Strickland, 466 U.S. at 689.

Finally, counsel is not deemed ineffective for failing to make or pursue claims that lack merit. See United States v. Cronic, 466 U.S. 648, 656, n. 19 (1984) (right to effective assistance of counsel does not require the "useless charade" of presenting a meritless defense); Vieux v. Peppe, 184 F.3d 59, 64 (1st Cir. 1999) (counsel's failure to pursue a futile tactic did not render his performance deficient).

Analysis

A. Failure to Object to Presentence Report

Voelker faults his counsel for not obtaining final approval of his *pro hac vice* motion until the time of sentencing. However, Voelker's assertion that the delay prevented counsel from objecting to the PSR is without merit. The delay did not prevent counsel from filing an objection either directly or through local counsel. Morever, the Court indicated its willingness to consider continuing the sentencing hearing in order to afford counsel an opportunity to file objections. After considering the matter, counsel, with Voelker's concurrence, elected to forego that opportunity and proceed with the sentencing.

Given the overwhelming evidence supporting the assignment of a leadership role to Voelker and his use of a minor as well as the discomfort expressed by counsel in having Voelker testify, under oath, that decision cannot be described as unreasonable. Nor was it unreasonable for counsel to refrain from objecting to the manner in which Voelker's criminal history category was calculated. USSG § 4A1.1 specifically provides for prior convictions to be taken into account in calculating a defendant's criminal history, and, contrary to Voelker's assertions, the Commentary to that section makes it

clear that convictions in state courts outside of the District should be included in that calculation. See USSG Guidelines Manual, §4B1.1, Commentary, Background at 292 (Nov. 1998) ("Prior convictions may represent convictions in the federal system, fifty state systems, the District of Columbia, territories, and foreign, tribal, and military courts."). Furthermore, despite Voelker's contentions, the sentence for driving under the influence does not fall within any of the exceptions enumerated in USSG 4A1.2(c).

In any event, because these objections lacked merit, there is no reasonable probability that the result would have been any different even if they had been asserted.

Other Objections

Voelker also claims that his counsel's failure to object to the PSR's description of some of the drugs at issue as cocaine base constituted ineffective assistance. Voelker contends that an examination "may" have revealed that this substance was cocaine powder, which carries a less severe Guideline range than cocaine base. That argument fails for two reasons. First, laboratory tests showed that the substances in question were cocaine base. Second, in his written plea agreement and during his plea colloquy, Voelker acknowledged that it was cocaine base.

Accordingly, it is absurd to suggest that counsel acted unreasonably in not arguing otherwise. See Cofske, 290 F.3d at 443-444.

B. Failure to Challenge Venue

Voelker contends that his counsel was ineffective in failing to seek dismissal of Count II on the ground that it charged a drug offense committed outside of the District (i.e., in Connecticut).

It appears that this objection is procedurally barred because it was not raised by Voelker's appellate counsel on direct appeal. See Maraville v. United States, 901 F.Supp. 62 (D.P.R. 1995)(trial counsel's failure to raise venue challenge on direct appeal did not constitute sufficient "cause" to permit raising issue in §2255 proceeding). In any event, the claim lacks merit.

A defendant has a constitutional right to be prosecuted in the state or district in which the offense charged was committed. U.S. Const. Art. III, § 2, cl.3, and Amend. VI, Fed.R.Crim.P. 18. See United States v. Johnson, 323 U.S. 273, 275, 65 S.Ct. 249, 250 (1944); United States v. Uribe, 890 F.2d 554, 558 (1st Cir. 1989).

The PSR describes the drug offense charged in Count II as a delivery that occurred in Connecticut but was initiated and

planned through telephone calls made in Rhode Island. See PSR at ¶6 at 3-4. These facts are not disputed.

Title 18 U.S.C. § 3237(a)(1994) provides:

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed....

The First Circuit has recently held that for purposes of criminal prosecutions:

> Venue must be determined from the nature of the crime alleged, determined by analyzing the conduct constituting the offense, and the location (or, if the crime is a continuing one, locations) of the commission of the criminal acts. If the crime consists of distinct parts, taking place in different localities, then venue is proper wherever any part can be proved to have taken place. ...

United States v. Scott, 270 F.3d 30, 35 (1st Cir 2001), cert den. 535 U.S. 1007, 122 S.Ct. 1583 (2002), citing United States v. Rodriguez-Moreno, 526 U.S. 275, 280, 119 S.Ct. 1239 (1999).

Here, the drug offense in question was a continuing crime that was "begun in Rhode Island and completed in Connecticut. Therefore, it could have been prosecuted in either district.

C. Failure to Enforce the Downward Departure "Agreement."

The short answer to Voelker's claim that counsel was deficient in not enforcing the Government's "agreement" to

seek a downward departure is that there was no such agreement. The Government agreed to seek a downward departure only if it determined, "in its sole discretion" that Voelker had provided substantial assistance in the investigation or prosecution of other crimes. Thus, the Government had "almost 'unbridled discretion'" in deciding whether to file such a motion. United States v. Doe, 233 F.3d 642, 644 (1st Cir. 2000). Voelker has provided no evidence whatever to suggest that the Government abused that discretion.

D. Voluntariness of Plea.

Voelker's final claim is that due to the ineffective assistance of his counsel, his plea was not voluntary. To prevail on that claim, Voelker "must prove by a preponderance of the evidence that his counsel unreasonably erred in permitting him to plead guilty, and that prejudice resulted." Cody v. United States, 249 F.3d 47, 52 (1st Cir. 2001)(citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984)).

Voelker has neither explained the basis for his claim nor presented any evidence to support it. Indeed, the claim is flatly contradicted by the record. At the plea hearing, Voelker was given a detailed explanation of the nature of the charges, the elements that the Government was required to

prove, the maximum sentence that could be imposed and the rights that he was relinquishing by choosing to plead guilty. He stated under oath that he understood all of those things; that the facts stated in the Government's proffer were true; and that he was pleading voluntarily. In addition, he expressed complete satisfaction with the performance of his counsel. See Transcript of Change of Plea Hearing conducted on May 9, 2000 at 27; 29-30 and 33-36.

Nor does Voelker make any claim of factual innocence. On the contrary, the record is replete with admissions of his involvement in the offenses in question.

The remaining claims raised in Voelker's papers do not warrant discussion.

Conclusion

For all of the foregoing reasons, Voelker's motion to vacate, set aside or correct sentence is denied.

IT IS SO ORDERED.

_____
Ernest C. Torres
Chief Judge

Dated: